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No. 80-171

In the Supreme Court of the United States

OCTOBER TERM, 1979

SAVE THE BAY, INC., PETITIONER

v.

UNITED STATES CORPS OF ENGINEERS,
THE UNITED STATES ARMY,
COLONEL DRAKE WILSON, AND
E.I. DUPONT DE NEMOURS AND COMPANY, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Army Corps of Engineers reasonably determined that the preparation of an environmental impact statement was not required when, under Section 10 of the Rivers and Harbors Act and

Section 404 of the Clean Water Act, the Corps issued a permit for the construction of a 2,200-foot outfall line requiring the removal of 610 cubic yards of bay bottom material.

2. Whether, after the State of Mississippi had issued a valid National Pollutant Discharge Elimination System permit authorizing the discharge of treated effluent from a manufacturing facility into the Bay of St. Louis, the Army Corps of Engineers properly limited the scope of its environmental assessment of a permit to construct the effluent discharge pipeline to the impacts of installation and maintenance of the pipeline itself.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	6
Conclusion	11
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Andrus v. *Sierra Club*, 442 U.S. 347	8
Atlanta Coalition, etc. v. *Atlanta Regional Com'n*, 599 F2d 1333	8
Berenyi v. *Immigration Director*, 385 U.S. 630	10
Biderman v. *Morton*, 497 F.2d 1141	8
Branti v. *Finkel*, No. 78–1654 (Mar. 31, 1980)	10
Citizens for Clean Air, Inc. v. *United States Corps of Engineers*, 349 F. Supp. 696	10
District of Columbia v. *Schram*, No. 78–2209, (D.C. Cir. June 18, 1980)	8
Friends of the Earth v. *Coleman*, 518 F.2d 323	8
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271	10
Harlem Valley Transportation Ass'n v. *Stafford*, 500 F.2d 328	9
Kleppe v. *Sierra Club*, 427 U.S. 390	9

Cases—Continued: Page

Mahelona v. *Hawaiian Electric Co.*, 418 F. Supp. 1328 10

NRDC v. *Morton*, 458 F.2d 827 9

Port of Astoria v. *Hodel*, 8 E.R.C. 1156, aff'd, 595 F.2d 467 10

Save Our Ten Acres v. *Kreger*, 472 F.2d 463 9

Save the Bay v. *Administrator of the EPA*, 556 F.2d 1282 2

Save the Bay v. *MAWPCC*, Civ. No. 577-0240 (S.D. Miss. Aug. 20, 1977), appeal dismissed, No. 77-3214 (5th Cir. June 22, 1978) 8

Save the Bay, Inc. v. *United States Army*, Civ. No. S18-0340(c) (S.D. Miss.), appeal argued and submitted, No. 79-2154 (5th Cir. Aug. 12, 1980) 2, 8

Save the Bay, Inc. v. *MAWPCC*, 341 So. 2d 98 2

Sierra Club v. *Froehlke*, 534 F.2d 1289 ... 9

Stryckers Bay Neighborhood Council v. *Karlen*, 444 U.S. 223 9

Swain v. *Brinegar*, 542 F.2d 364 9

Texas Committee on Natural Resources v. *Bergland*, 573 F.2d 201 9

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 9

Statutes, rules and regulations:

Clean Water Act, 33 U.S.C. (Supp. I) 1341 *et seq.*:

Section 402(b), 33 U.S.C. (Supp. I) 1342(b) 2, 8

Statutes, rules and regulations—Continued:	Page
Section 403, 33 U.S.C. (Supp. I) 1343	2
Section 404, 33 U.S.C. (Supp. I) 1344	5
Section 511(c), 33 U.S.C. (Supp. I) 1371(c)(2)(A)(B)	6
Fish and Wildlife Coordination Act, 16 U.S.C. 662	5
Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*	5
National Environmental Policy Act of 1969, Section 102(2)(C), 42 U.S.C. 4332(2)(C)	3, 5
River and Harbors Act of 1899, Section 10, 33 U.S.C. 403	2, 3
Sup. Ct. R. 21.1(k)	1
33 C.F.R. 209.120 (1975)	3
33 C.F.R. 209.120(h) (1975)	3
33 C.F.R. 209.410	3
33 C.F.R. 323.2	3
40 C.F.R. Part 1500.6(a) (1979)	7
40 C.F.R. Part 1500.6(c) (1979)	7
40 C.F.R. 1508.7 (1979)	8
40 C.F.R. 1508.18 (1979)	8
Miscellaneous:	
Exec. Order No. 11991, 3 C.F.R. 124 (1978)	7-8
42 Fed. Reg. 37125 (1977)	3
45 Fed. Reg. 56779 (1980)	8

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a–10a) is reported at 610 F.2d 322. The order of the court of appeals modifying its original opinion on denial of the petition for rehearing (App., *infra*, 1a–2a)[1] is not reported. The opinion of the United States magistrate (App., *infra*, 4a–19a) and the judgment of the district court (App., *infra*, 3a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 24, 1980. Rehearing was denied on March 17, 1980 (App., *infra*, 1a–2a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns the validity of a dredge and fill permit that the Army Corps of Engineers ("Corps") granted to E.I. DuPont De Nemours & Co., Inc. (DuPont), to construct a 2,200 foot effluent discharge

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[1] Contrary to Rule 21.1(k) of the Rules of this Court, the petition does not contain the court of appeals' order denying rehearing, the judgment of the district court, the opinion of the United States magistrate, or the court of appeals per curiam decision dismissing the petitioner's original appeal. Accordingly, these items are reprinted in the appendix hereto.

On November 14, 1978, the court of appeals dismissed petitioner's appeal on the ground that the judgment had been entered by a United States magistrate, rather than by a district judge (App., *infra*, 20a–21a). Thereafter, the district judge entered a judgment adopting the opinion of the magistrate (App., *infra*, 3a). The court of appeals affirmed (Pet. App. 1a–10a). The court of appeals then modified its opinion on denial of a petition for rehearing (App., *infra*, 1a–2a).

pipeline for the carriage of treated wastewater from DuPont's titanium dioxide manufacturing facility in Delisle, Mississippi, into the Bay of St. Louis. The effluent pipeline, which is 24 inches in diameter, is now in place, and the DuPont plant has been in operation since August 1979.[2]

On November 21, 1974, DuPont applied to the Corps for issuance of a dredge and fill permit under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. 403, and Section 404 of the Clean Water Act, 33 U.S.C. 1344, to install the effluent pipeline at its Delisle, Mississippi, plant. DuPont estimated that instal-

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[2] DuPont was required to secure several permits from the State of Mississippi in connection with the planning of its Delisle plant. DuPont obtained a discharge permit from the Mississippi State Marine Resources Council and an air emission and National Pollutant Discharge Elimination System (NPDES) permit from the Mississippi Air and Water Pollution Control Commission. In addition, the Interstate Commerce Commission, the Corps, and the Coast Guard issued permits in connection with the construction and operation of a railroad line from Gulfport, Mississippi, to the DuPont facility. None of these permits is at issue here.

Petitioner has challenged the air emission and water discharge permits granted by the State of Mississippi in three previous cases. See *Save the Bay, Inc.* v. *MAWPCC*, 341 So.2d 98 (Miss. 1976); *Save the Bay* v. *Administrator of the EPA*, 556 F.2d 1282 (5th Cir. 1977); *Save the Bay* v. *MAWPCC*, Civ. No. 577-0240 (S.D. Miss. Aug. 20, 1977), appeal dismissed, No. 77-3214 (5th Cir. June 22, 1978). Petitioner has also sought review of two other dredge and fill permits issued by the Corps and a river crossing permit issued by the Coast Guard for construction of a railroad line from Gulfport, Mississippi, to the Delisle plant. *Save the Bay, Inc.* v. *United States Army*, Civ. No. S78-0340(c) (D. Miss.), appeal argued and submitted Aug. 12, 1980, No. 79-2154 (5th Cir.).

lation of the pipeline would require removal from the Bay of 610 cubic yards of dredged material. On February 3, 1975, the Mississippi Air and Water Pollution Control Commission, acting in a separate proceeding under a permit program approved by the Environmental Protection Agency, pursuant to Section 402(b) of the Clean Water Act, 33 U.S.C. (Supp. I) 1342(b), granted DuPont's application for a National Pollutant Discharge Elimination System (NPDES) permit to discharge treated wastewater from the Delisle plant.

The Corps considered DuPont's application under its regulations governing regulatory permits and the preparation of environmental impact statements (EIS) under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). See, 33 C.F.R. 209.120(h) (1975); 33 C.F.R. 209.410.[3] In accordance with its regulations, the Corps issued a public notice of the DuPont permit application and sent copies of the notice to appropriate federal, state and local agencies, and to numerous environmental groups, business organizations and interested individuals. Without exception, the state and federal agencies advised the Corps that the proposed permit would not have any significant adverse impact on the environment. On June 19, 1975, the Corps held a public hearing to answer questions concerning the proposed pipeline permit and to

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[3] 33 C.F.R. 209.120 (1975) was rescinded on July 19, 1977 (see 42 Fed. Reg. 37125). New regulations now govern the issuance of Corps permits under Section 10 of the Rivers and Harbors Act and Section 404 of the Clean Water Act (see 33 C.F.R. 323.2). The new regulations do not affect the instant case. Corps regulations concerning the preparation of environmental impact statements were not changed by the 1977 regulations.

collect additional data for its environmental assessment. Petitioner's representatives expressed their opinions at that hearing. On the basis of its environmental assessment, the Corps would then determine whether the pipeline project was a major federal action requiring preparation of an EIS.

On July 17, 1975, the Corps district engineer issued an environmental assessment concerning the proposed permit. The district engineer determined that the pipeline would cause no adverse effect on air quality and that water quality would be only temporarily affected. The district engineer also found that construction and maintenance of the pipeline would not have any significant adverse effect on land use, wildlife, marine life, vegetation or historical interests. The district engineer did not re-evaluate the environmental impacts of the effluent discharge authorized by the NPDES permit; nor did he consider the impacts of construction and operation of the overall facility in his assessment. The district engineer concluded that the pipeline provided an environmentally sound method of diffusing treated wastewater[4] with a minimum amount of marsh destruction, and that the granting of the permit would not be a major federal action requiring preparation of an EIS. On August 6, 1975, the district engineer issued the dredge and fill permit. The permit authorized the construction of only the pipeline, and it was issued subject to several conditions, one of which

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[4] DuPont also considered several other discharge methods including deep well injection, which would not have required a Corps permit, but the company concluded that the pipeline method was the most environmentally sound.

required that DuPont have a proper NPDES permit governing the effluent discharge.

One year later, on August 5, 1976, petitioner filed this action seeking both declaratory and injunctive relief and money damages.[5] In particular, petitioner alleged that the Corps' issuance of the permit without preparation of an EIS violated Section 102(2)(c) of NEPA. The case was referred to a United States magistrate, who conducted a hearing on cross-motions for summary judgment and subsequently dismissed the action (App., *infra*, 4a–19a). The magistrate concluded that the Corps was required to consider in its environmental assessment only the effects of installation and maintenance of the effluent pipeline, rather than the environmental consequences of the entire project, and that the Corps' decision not to prepare an EIS was reasonable (App., *infra*, 17a–18a).

The court of appeals affirmed (Pet. App. 1a–10a). The court held that the Corps' conclusion that the effluent pipeline would not create any substantial adverse environmental impact was not unreasonable because it was supported by the Corps' environmental assessment and the positive comments received by other agencies (*id.* at 6a). The court also found that the Corps' decision not to reevaluate the effluent limitations set under the Mississippi State NPDES permit

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[5] Petitioner's claims for monetary relief and for relief under the Fish and Wildlife Coordination Act, 16 U.S.C. 662, Section 403 of the Clean Water Act, 33 U.S.C. 1343; and the Marine Protection Research and Sanctuaries Act of 1972, 33 U.S.C. 1401 *et seq.*, were all dismissed with prejudice (App., *infra*, 3a, 19a). Petitioner did not seek review in the court of appeals of the order dismissing these claims.

was proper under Section 511(c) of the Clean Water Act, 33 U.S.C. 1371(c)(2)(A)(B). Under Section 511(c) federal agencies may not invoke NEPA to review effluent limitations or impose limitations other than those set pursuant to the Clean Water Act (Pet. App. 8a). Finally, the court concluded that the Corps' decision to limit its environmental consideration to the construction and operation of the pipeline itself was not unreasonable (*ibid.*). While the court noted that in certain cases permissions and approvals by federal agencies may be of such significance that they effectively "federalize" an otherwise private action, thereby making the private action subject to NEPA (*id.* at 9a), the court concluded that the federal involvement here was not sufficient to require NEPA review of the entire DuPont plant (*id.* at 10a).

ARGUMENT

This case presents no issue warranting review by this Court. The judgment of the court of appeals does not conflict with any decision of this Court or any other court of appeals.

1. Petitioner first contends that the Corps should have prepared an EIS to evaluate the environmental impact of the entire plant because the "cumulative impact" of all federal permits accompanying the plant's construction and related activities, was sufficient to "federalize" these activities and thereby trigger the need for an EIS (Pet. 9–10). Petitioner bases its contention (*id.* at 3) on guidelines issued in 1973 by the Council on Environmental Quality (CEQ), which provided for the preparation of an EIS in certain circum-

stances where several federal agencies independently permit separate aspects of one major action. See 40 C.F.R. Part 1500.6(a) (1979). Although DuPont's permit was issued while those guidelines were in effect, they do not support petitioner's contention.

While CEQ guidelines required the preparation of an EIS "if it is reasonable to anticipate a cumulatively significant impact on the environment from [the] Federal action" (40 C.F.R. Part 1500.6(a)(1979)), the guidelines further explained that the action causing the impact must be subject to federal control and responsibility to be considered "federal." *Id.* at Part 1500.6(c).[6] The only federal permit at issue here is that authorizing the removal of dredged material necessary for constructing the pipeline. Significantly, the NPDES permit authorizing the discharge of treated wastewater into the Bay of St. Louis was granted not by the Corps, but by the State of Mississippi Air and Water Pollution Control Commission, and it was not at

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[6] 40 C.F.R. Part 1500.6(c) (1979) (emphasis added) provided in pertinent part :

> The identification of major actions significantly affecting the environment is the responsibility of each Federal agency, to be carried out against the background of its own particular operations. The action must be a (1) "major" action, (2) which is a "Federal action," (3) which has a "significant" effect, and (4) which involves the "quality of the human environment." *The words "major" and "significantly" are intended to imply thresholds of importance and impact that must be met before a statement is required. The action causing the impact must also be one where there is sufficient Federal control and responsibility to constitute "Federal action."*

Prior to 1977, CEQ had no authority to issue regulations, but could issue only guidelines. See Exec. Order No.

issue in this case.[7] Moreover, the effluent pipeline itself was not necessary for the operation of the plant, and at least one alternative not requiring any Corps permit was available to DuPont. In these circumstances, the court of appeals was correct in concluding that the issuance of a pipeline construction permit was not a major federal action requiring an EIS concerning the environmental impact of the entire DuPont project, given the existence of a valid State NPDES permit.[8]

2. Petitioner's principal contention (Pet. 10) is that the court of appeals erred in holding that the Corps

11991, 3 C.F.R. 124 (1978). See also *Andrus* v. *Sierra Club*, 442 U.S. 347, 357-358 (1979). CEQ's regulations altered the former guidelines (see 40 C.F.R. Parts 1508.7, 1508.18 (1979)), and the Corps has also amended its regulations (see 45 Fed. Reg. 56779 (Aug. 25, 1980)).

[7] NEPA applies, of course, only to federal actions or federally funded actions, not to state or local actions. *Atlanta Coalition, etc.* v. *Atlanta Regional Com'n*, 599 F.2d 1333, 1347 (5th Cir. 1979); *Friends of the Earth* v. *Coleman*, 518 F.2d 323, 327-329 (9th Cir. 1975); *Biderman* v. *Morton*, 497 F.2d 1141, 1147 (2d Cir. 1974). In addition, NEPA does not apply to new source NPDES permits issued by states having approved NPDES permit programs in accordance with Section 402(b) of the Clean Water Act, 33 U.S.C. (Supp. I) 1342(b). *District of Columbia* v. *Schram* No. 78-2209 (D.C. Cir. June 18, 1980), slip op. 16 n.14.

[8] The only other federal permits issued in connection with the DuPont plant were permits necessary for the construction and operation of a railroad line from Gulfport, Mississippi, to the DuPont plant. These permits were not necessary to the operation of the DuPont plant itself, and they were not challenged in this case. Petitioner unsuccessfully challenged those permits in a separate proceeding, which is currently on appeal in the Fifth Circuit. *Save the Bay* v. *United States Army*,(Civ. No. S18-0340(c) (S.D. Miss.), appeal argued and submitted Aug. 12, 1980, No. 79-2154 (5th Cir.).

acted reasonably in limiting its consideration of potential environmental impacts to the construction and maintenance of the effluent pipeline, rather than considering the entire DuPont plant, in deciding not to prepare an EIS. In the particular circumstances of this case, the court of appeals' decision was correct.

The requirements of NEPA are to be construed in light of a "rule of reason." See, *e.g.*, *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1299 (8th Cir. 1976); *Harlem Valley Transportation Ass'n* v. *Stafford*, 500 F.2d 328, 337 (2d Cir. 1974); *NRDC* v. *Morton*, 458 F.2d 827, 837 (D.C. Cir. 1972). Only if the Corps' decision was unreasonable may it be reversed. See, *e.g.*, *Kleppe* v. *Sierra Club*, 427 U.S. 390, 412 (1976); *Texas Committee on Natural Resources* v. *Bergland*, 573 F.2d 201, 206 (5th Cir. 1978); *Save our Ten Acres* v. *Kreger*, 472 F.2d 463, 465 (5th Cir. 1973). And, in reviewing an agency's determination, "[t]he task of the court is not to decide where to draw the line, but to review the matter to ascertain whether the agency has made a reasonable choice." *Swain* v. *Brinegar*, 542 F.2d 364, 369 (7th Cir. 1976). See also *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 410 n.21.[9] In view of the limited federal action being taken here, the court of appeals correctly sustained the reasonableness of the Corps' decision to consider in its environmental as-

[9] While NEPA establishes significant substantive goals for the nation, the duties it imposes upon agencies are "essentially procedural." *Stryckers Bay Neighborhood Council* v. *Karlen*, 444 U.S. 223, 227 (1980); *Vermont Yankee Nuclear Power Corp.* v. *NRDC*, 435 U.S. 519, 558 (1978). Here, petitioner has neither alleged nor shown that the procedural requirements of NEPA were not met.

sessment the environmental impacts of only the construction and maintenance of the effluent pipeline. The DuPont facility is a privately financed project, and the State of Mississippi issued all of the permits necessary for its operation. The sole federal involvement in the DuPont project was a dredge and fill permit needed for construction of an effluent pipeline which, as previously noted, was not necessary to the operation of the facility.

Petitioner's contention that the decision below conflicts with decisions in other circuits (*Port of Astoria* v. *Hodel*, 8 E.R.C. 1156 (D. Ore. 1975), aff'd, 595 F.2d 467, 477 (9th Cir. 1979); *Citizens for Clean Air, Inc.* v. *United States Corps of Engineers*, 349 F.Supp. 696, 700 (S.D.N.Y. 1972); and *Mahelona* v. *Hawaiian Electric Co.*, 418 F. Supp. 1328, 1336 (D. Hawaii 1976)), is unfounded. The Fifth Circuit, upon whose analysis (Pet. App. 10a) we rely, carefully considered each of these decisions and concluded that they were inapplicable to the circumstances presented here. In each of the cases petitioners invoke, the court of appeals found dispositive certain facts that are absent here. Consequently, the court of appeals concluded that the Corps was not required to consider the entire DuPont facility in determining whether an EIS was necessary. Further review of that fact-bound issue is unwarranted. See, *e.g.*, *Branti* v. *Finkel*, No. 78-1654 (Mar. 31, 1980), slip op. 5 n.6; *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967); *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX

SAVE THE BAY, INC., PLAINTIFF-APPELLANT,

v.

THE UNITED STATES CORPS OF ENGINEERS,
THE UNITED STATES ARMY,
COLONEL DRAKE WILSON AND
E. I. DUPONT DE NEMOURS & COMPANY, INC.,
DEFENDANTS-APPELLEES

No. 79-1432.
United States Court of Appeals,
Fifth Circuit.

March 17, 1980.

Appeal from the United States District Court for the Southern District of Mississippi; Dan M. Russell, Jr., Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion January 24, 1980, 5 Cir., 1980, 610 F.2d 322).

Before BROWN, TJOFLAT AND GARZA, Circuit Judges.

PER CURIAM:

We withdraw the first sentence of our opinion in the above styled cause and substitute therefor the following:

> Appellant appeals from the District Court's adoption and entry of judgment in conformity with the

refusal of the United States Magistrate, acting on behalf of the District Court by consent of the parties, to require the United States Corps of Engineers to prepare an Environmental Impact Statement (EIS) as provided for under the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. § 4321 *et seq.*

In all other respects, the Petition for Rehearing filed on behalf of Save The Bay, Inc., is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

JUDGMENT

This cause having come before the Court on remand from the Court of Appeals for the Fifth Circuit because the final judgment in this case was entered by a United States Magistrate, the Circuit Court having determined subsequent to the entry thereof that a Magistrate cannot enter a final judgment, even with the consent of the parties, and this Court, having fully reviewed this matter, hereby adopts the opinion filed by the Magistrate and enters Judgment in accordance therewith. Accordingly, it is hereby

ORDERED AND ADJUDGED that the motions of the Defendants, United States Corps of Engineers, the United States Army, Colonel Drake Wilson, and E.I. DuPont DeNemours for summary judgment are hereby granted, the cross motion of the Plaintiff, Save the Bay, Inc., for summary judgment is hereby denied, and this case is dismissed with prejudice, all parties to bear their own costs.

ORDERED AND ADJUDGED this the 24 day of January, 1979.

/s/ HAROLD COX
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT
OF MISSISSIPPI
SOUTHERN DIVISION

No. S76-198 (C)

SAVE THE BAY, INC., PLAINTIFF

v.

THE UNITED STATES CORPS OF ENGINEERS,
THE UNITED STATES ARMY,
COLONEL DRAKE WILSON, AND
E.I. DU PONT DE NEMOURS AND COMPANY,
DEFENDANTS

FINDING OF FACT AND CONCLUSION OF LAW

This cause having come for hearing on motions of the defendants for summary judgment, affidavits, and documentary evidence and the court having considered the same, hereby enters the following Finding of Fact and Conclusion of Law:

FINDING OF FACT

1. On November 21, 1974, the United States Army through the Corps of Engineers (Corps) received an application from E.I. du Pont de Nemours and Company (Du Pont) for a permit for the installation of a 24 inch effluent outfall line extending from Du Pont's proposed plant approximately 2200 feet into the Bay of St. Louis, Mississippi.

2. The Corps issued a Public Notice on December 9, 1974 to solicit comments from State, Federal and Local agencies and from the public concerning such permit. This notice was mailed to *123* addressees.

3. Such Applications and Notice provided that no discharge from the outfall line would occur unless Du Pont obtained a National Pollutant Discharge Elimination System (NPDES) permit authorizing such discharge.

4. Various responses to such public notice were received by the Corps, including:

a. Letter dated 12/23/74 from the Fish and Wildlife Service noting that it was reviewing Du Pont's proposed NPDES permit for discharge through the outfall.

b. Letter dated 1/23/75 from Du Pont advising the Corps that it was revising its application to meet objections that Du Pont had received.

c. Letter dated 2/7/75 from the Mississippi State Clearing House for Federal Programs which informed the Corps that the works was consistent with State goals and policies. This letter also enclosed a copy of a permit issued by Mississippi Marine Resources Council to Du Pont which found that the proposed project would have no significant adverse impact on coastal wetlands.

d. Letter dated 2/25/75 from the Environmental Protection Agency to the Corps advising the Corps that EPA had no objections to the issuance of the permit since the activity associated with the construction of the outfall would have only temporary and minimal ecological effects. The letter further noted that Mississippi Air and Water Pol-

lution Control Commission was issuing a NPDES discharge permit with which EPA concurred.

e. Letter dated 3/4/75 from Fish and Wildlife Service advising the Corps that the project would have no adverse effects on fish and wildlife resources and therefore it had no objection to the permit.

f. Letter dated 3/5/75 from EPA advising the Corps that NPDES authority had been delegated to the State of Mississippi; that requirements of NEPA Section 102(2)(c) were no longer applicable and that EPA would not prepare an Environmental Impact Statement (EIS), and would not require Mississippi to do so.

g. Letter dated 3/14/75 from the National Marine Fisheries Service advising the Corps that it would not make a definite recommendation because it was unable to adequately investigate it.

h. Letter from Mrs. Chris Jacob, conservation chairman, Sierra Club, undated, objecting to dredging marshlands to discharge into the Bay of St. Louis and to altered land usage.

i. Letter from Save the Bay, Inc., dated 5/21/75, responding to the Corps' Notice of Public Hearing, objecting to the issuance of the permit for various reasons and requesting that hearing be postponed.

5. The Corps issued a Notice of Public Hearing on March 27, 1975, which fixed June 19, 1975, as date for a public hearing on the questions of issuing such permit.

6. Pursuant to Notice, such hearing was held at the West Side Community Center, Gulfport, Mississippi, from 1:00 p.m. to 3:45 p.m. The applicant, proponents and opponents were given unlimited time for their

presentations. A verbatim transcript of the hearing, including all written statements and data were made a part of the record.

7. Included in the record were written objections from 20 persons, or organizations. Proponents included Gulfport Jaycees, Mississippi State Port Authority, City of Pass Christian, City of Long Beach, Harrison County Development Commission, Gulfport Area Chamber of Commerce, and Governor William Waller.

8. On July 17, 1975, Colonel Drake Wilson, District Engineer for Mobile Corps issued a Statement of Findings. This statement reviewed the proposed permit, assessed the environmental effects and impacts upon air quality and water quality. It determined that the work (outfall line) would have no adverse effect on air quality and the water quality would be effected temporarily and such effects would be localized by the construction of the outfall line. The findings also noted that Du Pont had received an NPDES permit from the State of Mississippi for the discharge and that the EPA had participated thoroughly in the formulation of the permit and concurred in the issuance of the permit. Additionally, the EPA had no objection to the issuance of the Corps permit. It was also noted that the Mississippi Marine Resources Commission had issued its permit for the outfall line.

9. In addition, Colonel Wilson made additional assessments of the environmental effects and impacts regarding (a) land use; (b) noise; (c) visual aesthetics; (e) waste disposal; (f) wildlife; (g) fisheries; (h) salt marsh and estuarine bottom; (i) beach; (j) historical.

10. The statement found that the public interest would be served since the proposed outfall line would provide an "environmentally sound method of diffusing the treated wastewater [from the Du Pont plant] and the outfall site offers the minimum amount of marsh destructions."

11. Various agencies' comments were listed as were the names of opponents and proponents who submitted written comments.

12. Based upon the review of the entire record, Colonel Wilson concluded that the environmental effects associated with the proposed action are such that preparations of an environmental impact statement was not required. He also noted as a matter of record that EPA specifically excluded the effluent from the Du Pont plant as requiring an environmental statement, and noted that EPA had advised the Corps that EPA would not prepare an EIS on the DuPont plant. He also noted that no state or federal agency was opposed to the issuance of the permit and no agency had recommended conditions or restrictions to such permit.

13. Based upon such record, the environmental assessment the comments of various persons, and state and federal agencies, he directed that the permit be issued on June 17, 1975.

14. On August 6, 1975, the United States Army, through the Corps issued the permit to Du Pont. The permit allows Du Pont to construct an outfall pipe, with attendant structures in the Bay of St. Louis, and to dredge a trench in the Bay bottom to lay the pipe. The work was described as follows:

"Installation of a 24 inch diameter effluent outfall line extending approximately 2200 feet into the Bay, by dredging a trench. Approximately 610 cu. yds. of material will be dredged and deposited in an upland disposal site on the applicant's property. Installation of two dolphins for the purpose of displaying a warning sign over the outfall line. A continuous fender structure with warning lights at the center and both ends will be erected in order to prevent accidental navigation through the diffuser section. The effluent outfall line will carry wastewater discharge from a proposed titanium dioxide manufacturing plant. Work will front applicant's property, St. Louis Bay, Harrison County, Mississippi, in accordance with the plans and drawings attached hereto which are incorporated in and made a part of this permit subject to the following conditions."

15. The permit contains 14 general conditions, and the following special conditions:

"This permit does not authorize any discharges subject to the National Pollutant Discharge Elimination System, Public Law 92-500, as required from the appropriate permitting agency."

16. The special condition cited in Section 15 of this Finding of Fact was satisfied by the issuance by the Mississippi Air and Water Pollution Control Commission permit board of NPDES permit No. MS 0027294 to Du Pont on February 3, 1975.

17. The action of the Corps in issuing the outfall permit is limited to the authorization of the activity specified in said permit. The activity of the Corps in this regard is not major federal action significantly affecting the quality of the human environment.

18. The environmental assessment contained in Colonel Drake Wilson's Statement of Findings is reasonable, and is based upon substantial evidence.

19. The defendant, Du Pont, has aided and assisted and abetted the Corps in securing the permit, but such activity is permissible as it is in the case of any applicant to the Corps for a permit, and there is no evidence that such activity exceeded permissible bounds.

20. On February 17, 1977, this court held a hearing on Defendant's Motion for Summary Judgment, and Plaintiff's Cross-Motion for Summary Judgment. Since such hearing three separate but related cases have been disposed of or are pending, of which this court takes judicial notice under Rule 803 and Rule 201 of the Federal Rules of Evidence. These three matters are:

I. RELATED LITIGATION

(a) *Case 1. Save the Bay, Inc. v. Mississippi Air and Water Pollution Control Commission*, in the matter of Air Emissions Permit No. 1020-00115 and Wast Water Discharge Permit No. MS0027294 issued to E.I. DuPont de Nemours & Company, pending before the Mississippi Air and Water Pollution Control Commission.

Case 2. Save the Bay, Inc. vs. Administrator of the Environmental Protection Agency, No. 75-1633, United States Court of Appeals, Fifth Circuit, decided on August 5, 1977.

Case 3. Save the Bay, Inc. vs. Mississippi Air & Water Pollution Control Commission; Environmental Protection Agency, Douglas M. Costle, Administrator

of the Environmental Protection Agency, and the United States of America, Civil Action No. S77-0240(N), United States District Court, Southern District of Mississippi, Southern District of Mississippi, Southern Division, dismissed on August 20, 1977.

(b) The case, *sub judice*, as do Cases 1 through 3, arise out of the efforts of Save the Bay, Inc. to prevent E.I. DuPont de Nemours & Company (DuPont) from constructing a large manufacturing facility on the north shore of Bay St. Louis, Mississippi, and to prevent it from discharging treated water effluent in waters which discharge is permitted under the permits referred to in Case No. 1 above.

(c) One of the attacks upon the Corps of Engineers permit to construct the outfall line in the case *sub judice*, is that the Corps of Engineers failed to prepare an Environmental Impact Statement regarding the effects of the discharge of treated waste water into the Bay of St. Louis, which the MAWPCC has permitted, the EPA has approved, and that such discharge violates the FWPCA standards. Though the Cases numbered 1 through 3 are against defendants other than the two defendants in the case *sub judice*, nevertheless, all four cases have the same objective, and that is to prevent DuPont from discharging waste water into the Bay through such out-fall line and thus prevent construction of the Plant. For this reason, the status of such cases are material to a disposition of this case.

II. STATUS OF RELATED LITIGATION

(a) *Case 1.* This case represents the direct attack of Save the Bay, Inc. against the air and water effuent

discharges. The case is the result of a decision of the Mississippi Supreme Court in the matter of *Save the Bay, Inc. v. MAWPCC*, No. 49,509, dated November 23, 1976, which held that the Mississippi Air and Water Pollution Control Act, 49-17-1 through 49-17-43, required the MAWPCC to grant to Save the Bay, Inc. a fair hearing. This decision did not set aside such permits, but only required such hearing. Pursuant to the mandate of such Court, MAWPCC has been conducting hearings and has officially recorded its intent to render its decision no later than December 9, 1977.

(b)(1) *Case 2*. This case represented an attack upon the action of the Environmental Protection Agency in granting to the MAWPCC the authority to issue NPDES permits pursuant to the Federal Water Pollution Control Act Amendments 33 USC Sec. 1251-1376, and also attacked EPA's refusal to veto the MAWPCC permit issued to DuPont.

(b)(ii) The Court held that full administrative development in the form of specific requests by Save the Bay, Inc., to EPA for withdrawal of NPDES authority to MAWPCC and an official determination by EPA must preceed judicial reviews and therefore dismissed the case without prejudice on that issue. As to EPA's alleged failure to block the permit, the court held that Courts of Appeal lack original jurisdiction to review EPA's omission to veto a proposed permit under a state program and dismissed Save the Bay, Inc.'s claim. The Court summarized District Court reviewability of EPA's decision not to issue a permit. The Court stated that such review must be limited to two (2) narrow considerations: Whether a proposed permit

contained a violation of applicable federal guidelines that the agency has failed to consider; and whether unlawful factors have tainted EPA's exercise of discretion.

(b) (iii) The Court of Appeals dismissed the case without prejudice on the first issue, and dismissed with prejudice on the other two issues. It necessarily follows that at this time, the MAWPCC is the duly authorized agency of the State of Mississippi which EPA has delegated its NPDES permitting authority, and that this line of attack has failed.

(c) (i) *Case 3*. This case was brought as an original action against EPA and MAWPCC by Save the Bay, Inc. Such suit was filed on or about July 11, 1977, and sought, among other things, a Temporary Restraining Order cancelling the hearing referred to in Case 1; a mandatory injunction directing the MAWPCC to enjoin DuPont from continuing the construction of its plant; cancellation of the MAWPCC's permits; designation of EPA as an appropriate agent to conduct any further hearings; preparation by EPA of an EIS pursuant to NEPA; a declaratory judgment concerning issues raised in the pleadings regarding such permits; a *writ* of *mandamus* or injunction to EPA directing it to withdraw EPA's authorization of MAWPCC's authority to issue NPDES permits; a monetary judgment in favor of Plaintiff in the amount of $150,000.00 and costs, damages, and attorneys fees.

(c) (ii) Plaintiff noticed a Motion for Hearing on its prayer for a Temporary Restraining Order for August 19, 1977. Judge Nixon heard this motion and found that Save the Bay, Inc., had made no showing of im-

mediate and irrepairable harm, injury, loss or damage; no showing that Plaintiff would be successful on the merits; and found that a cancellation of the MAWPCC hearings (Case # 1) would not be in the public interest; that MAWPCC and EPA had no authority to halt construction of the plant; and EPA had no authority to cancel DuPont's permits.

(c) (iii) The court recessed the hearings on August 19, 1977, and stated that it would rule the following day on Defendants Motion to Dismiss. One of the issues raised by the Defendant's Motion to Dismiss was the standing of the Plaintiff to bring such suit. Save the Bay, Inc. alleged in Case No. 3, as in the case *sub judice*, that is had standing to bring such suit. The Court found from an examination of the pleadings and proof before it that Save the Bay, Inc., had no standing to sue MAWPCC or EPA.

(c) (iv) Another issue before the Court in Case 3 was the allegation of Save the Bay, Inc., that the discharge of treated waste water in the Bay of St. Louis was a "new source" and that EPA was required to prepare an Environmental Impact Statement. The Court found that such discharge was not a "new source" and that EPA was not required to prepare an EIS.

(c) (v) Such opinion was incorporated in Judge Nixon's order by reference, and the Court entered its order dated August 20, 1977, dismissing the Complaint with prejudice. Plaintiff gave timely notice of appeal, but the record on appeal has not been lodged with the Circuit Court of Appeals for the Fifth Circuit.

(c) (vi) The Court finds that the MAWPCC has not been enjoined from proceeding with such hearing re-

ferred to as Case 1, and that such hearing is proceeding.

III. EFFECT OF SUCH DECISIONS:

(a) MAWPCC Permit:

The efforts of the Plaintiff to attack the EPA approved permit to discharge treated waste water into the Bay of St. Louis, if successful, would have suspended the efficacy of the Corp of Engineers Permit, as one of the conditions of the COE permit was that such discharge comply with MAWPCC standards. The direct attack against MAWPCC's authority to issue such permit as represented by Case 2 has failed. The efforts to suspend the efficacy of such permit represented by Case 3 pending a "fair hearing" before the MAWPCC in Case 1 has failed. The Court finds that the MAWPCC has exclusive jurisdiction to issue such permit, that such permit is in full force and effect, and that the condition in the COE permit requiring DuPont to secure the MAWPCC permit is satisfied.

(b) Standing to Sue:

Based upon the record before the Court in the case *sub judice*, and the Court's findings in Case 3 that Save the Bay, Inc., did not have standing to bring such suit, this Court finds as a fact that the Plaintiff has failed to allege or show any facts which establish that it is aggrieved, adversely affected, wronged or has sustained economic injury as a result of the action of the Issuance of the Corps of Engineers permit which is the subject of this case. The decision of the Court in Case 3 is not *res adjudicata*, nor is collateral *estoppel* involved. Such decision is persuasive, how-

ever, and the Court finds in this case that Save the Bay, Inc., represents six individuals who reside principally in New Orleans, Louisiana, and who maintain vacation homes in Hancock County, Mississippi. The remaining four individuals represented by Save the Bay, Inc. reside in Hancock County. No persons who are represented by the Plaintiff reside in Harrison County, Mississippi, nor have any of such persons alleged or proved that they have or will be aggrieved, adversely effected, wronged, or will sustain injury by the construction of such outfall line or discharge of treated waste water from such outfall line.

CONCLUSIONS OF LAW

1. The standard for review of the threshold determination that an EIS need not be prepared is whether such determination is reasonable. *Save Our Ten Acres v. Kreger*, 472 F.2d 463 (5th Circuit, 1973).

2. In applying the test of reasonableness, the threshold determination is still for the agency to make and such determination should be upheld if the determination was reasonable and was made objectively and in good faith on a reviewable environmental record. *Rucker v. Willis*, 484 F2d 158, (4th Circuit, 1973); *Morningside Renewal Committee v. U.S. Atomic Energy Comm.*, 482 F.2d 234 (2nd Circuit, 1973), cert. denied 417 U.S. 951, 94 S.Ct. 3080, 41 L. Ed. 2d 672; *Hendrickson v. Wilson*, 374 F. Supp. 856 (D.C. Mich., 1973).

3. The provisions of NEPA must be read in the context of other statutes such as the specific language in the Federal Water Pollution Control Act which places

the control of water pollution caused by discharges of effluents in the hands of the states and the Environmental Protection Agency. *U.S. v. SCRAP*, 412 U.S. 669, 43 S. Ct. 2405, 37 L.Ed. 2d 254.

4. Congress placed the responsibility for the control of effluents in the hands of the state and the Environmental Protection Agency. 33 U.S.C. Sec. 1251(b), (d), 1311, 1341, 1342, and 1371.

5. The Corps, while it could rely upon the determination of EPA and the state that the effluent would not have a significant effect on the environment, had to make its own determination on the effects caused by the activity authorized by the Corps permit. *Mahelona v. Hawaiian Electric Company*, 417 F. Supp. 1328 (D. Hawaii 1976).

6. The issuance of the Corps permit was not a sufficient nexus between the Corps and the construction of the DuPont plant to make the Corps a partner in such construction and thereby "federalize" the construction of the DuPont plant. *Sierra Club v. Hodel*, F.2d (9th Circuit, 1976) (7 ELR 20008); *Port of Astoria v. Hodel*, F. Supp. (D. Ore., 1975) (8 ERC 1156).

7. The environmental assessment prepared by Colonel Drake Wilson in his statement of Findings dated July 17, 1975, addresses the possible environmental consequences of the activity authorized by the Corps permit, is based upon substantial evidence and is reasonable. The procedures followed by the Corps comply with appropriate federal regulations and statutes. The Corps determination not to prepare an Environmental Impact Statement was proper.

8. The Corps fulfilled its objection under the Fish and Wildlife Coordination Act. *Sun Enterprises v. Train*, 532 F2d 280 (2nd Circuit, 1976).

9. Section 301(a) of the Federal Water Pollution Control Act imposes no requirements on the Corps during its issuance of the DuPont permit. 33 U.S.C. 1311(a).

10. The Corps complied with the requirements of Section 404 of the Federal Water Pollution Control Act. 33 U.S.C. 1251, 1341.

11. The Mississippi Air and Water Pollution Control Commission through its permit Board, has exclusive jurisdiction to issue Waste Water Discharge Permit No. MS0027294 to DuPont. *Save the Bay, Inc., v EPA*, No. 75-1633, 556 F2d 1281 (5th Circuit).

12. Such Permit is, unless otherwise modified or revoked, in full force and effect. *Save the Bay, Inc., v. MAWPCC*, 341 So2d 98; *Save the Bay, Inc. v. EPA*, No. 75-1533, 556 F2d 1282, (5th Circuit).

13. Such Permit is in full force and effect, and satisfies the Conditions of the Corps of Engineers Permit relating to waste discharges into the Bay of St. Louis.

14. Save the Bay, Inc., has no standing to seek review of a Permit issued by the Corps of Engineers to DuPont. *Sierra Club* v. *Morton*, 405 US 727, 31 L.Ed 2d, 636, 92 S.Ct. 1361, (1971); *Save the Bay, Inc.*, v. *MAWPCC, et al*, Civil Action S77-0204 (N), USDC, Southern District of Mississippi, Southern Division, (1977).

15. The issuance of the COE permit was proper.

16. There is no cause of action stated against DuPont.

17. There is no genuine issue of fact, and as a matter of law, Defendants are entitled to Summary Judgment.

18. Such complaint is dismissed with Prejudice at costs of Plaintiff.

ORDERED this the 16th day of December, 1977.

JOHN ROPER

UNITED STATES MAGISTRATE

7

In the United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 78-1310
Summary Calendar*

SAVE THE BAY, INC., PLANTIFF-APPELLANT,

v.

THE UNITED STATES CORPS OF ENGINEERS,
UNITED STATES ARMY,
COLONEL DRAKE WILSON AND
E. I. DUPONT DENEMOURS AND COMPANY, INC.,
DEFENDANTS-APPELLEES.

Appeal from the United States District Court for the Southern District of Mississippi

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(NOVEMBER 14, 1978)

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* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.

Before CLARK, GEE and FAY, CIRCUIT JUDGES.

PER CURIAM:

In this environmental suit about the discharge of pollutants into Bay St. Louis, all parties consented to trial and the entry of final judgment by the magistrate and the district court approved this consent. The resulting judgment is appealed to us, but it is not appealable. Magistrates cannot enter final judgments, even with the consent of the parties. *Carmena* v. *International Union of Operating Engineers*, Local 406, 572 F.2d 1031 (5th Cir. 1978).

As in *Carmena*, we therefore dismiss the appeal without prejudice to a future appeal following the district court's review of the magistrate's actions and the entry of a final judgment by the district court.

DISMISSED.

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